



DEPARTMENT OF EDUCATION

34 CFR Part 81

[Docket ID ED-2021-OFO-0121]

RIN 1880-AA91

Standardizing Filing Procedures for Administrative Appeals

AGENCY: Office of Finance and Operations, Department of
Education.

ACTION: Final regulations.

SUMMARY: The U.S. Department of Education (Department)
amends the regulations regarding administrative hearings
and appeals to require filing using the Office of Hearings
and Appeals (OHA) electronic filing system (OES).

DATES: These final regulations are effective [INSERT DATE
OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Anthony Cummings, 400
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If you use a telecommunications device for the deaf
(TDD) or a text telephone (TTY), call the Federal Relay
Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

As explained more fully below, the Department is
amending its regulations in 34 CFR part 81 to require the
use of electronic filing (e-filing) in certain cases before

OHA, and in appeals of decisions issued by OHA to the Office of the Secretary (OS), involving the General Education Provisions Act (GEPA) or applying the procedures applicable to GEPA matters. These amendments to the regulations also provide an opportunity for parties to file a motion showing good cause that they are unable to utilize electronic filing.

Summary of Changes:

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address regulatory provisions that are technical or otherwise minor in effect.

PART 81 - GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

Statute: Under 20 U.S.C. 1221e-3, the Secretary is vested with broad authority to “make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.” This provision is mirrored in 20 U.S.C. 3474, providing the Secretary authority to “prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.” In particular, under 20 U.S.C. 1234(f)(1), “the Secretary shall prescribe by regulation” the rules for conducting proceedings within the Office of Administrative Law Judges (OALJ). Such rules must conform to the elements

of the Administrative Procedure Act (APA) at 5 U.S.C. 554, 556, and 557.

Current Regulations: The current regulations in 34 CFR part 81 govern the enforcement of legal requirements under applicable programs administered by the Department and implement part E of GEPA. These regulations primarily concern the functioning of OALJ, including its hearing procedures. Section 81.2 provides definitions, while §§ 81.11, 81.12, 81.20, and 81.42 provide procedures and requirements for parties filing documents with the Department in OALJ hearings. Sections 81.41 and 81.44 provide procedures for how OALJ and the Secretary issue decisions. These regulations permit parties to file with the Department via mail, hand-delivery, or facsimile transmission. They require OALJ and the Secretary to issue decisions to the parties via certified mail, return receipt requested.

New Regulations: The new regulations at §§ 81.2, 81.11, 81.12, 81.20, 81.41, 81.42, and 81.44 require e-filing by the parties and the Department, unless, upon motion, a party shows good cause for why the document cannot be filed electronically. To accommodate e-filing, the Department is making other conforming amendments in part 81.

Specifically, we are revising §§ 81.12(d)(1) and 81.42(g) to provide that the date of an e-filing is the date it is submitted to OES or, if the Administrative Law Judge (ALJ)

has permitted a paper submission, the date the material is hand-delivered or mailed. We are revising § 81.12(e) to require a party filing electronically to ensure that the Department receives a complete and legible copy of the document in a format for electronic filing permitted under OHA procedures. Those procedures are currently accessible at <https://oha.ed.gov/online-filing/>. We are also revising §§ 81.41(c) and 81.44(b) to generally require the Department to e-file initial and final decisions, respectively. Under the revised regulations, if the ALJ permits a party to make a paper submission, upon a showing of good cause, the Department must send its initial and final decisions by certified mail, return receipt requested, or another parcel service with delivery confirmation. We are also removing references to facsimile transmission from revised §§ 81.12, 81.20, and 81.42 because that is an outdated practice that we no longer use. Lastly, revised §§ 81.11(c), 81.20(d)(2), and 81.42(d) and (f) require a party to serve a copy of the submission on the other party by hand delivery or mail only where the party has been permitted to make a paper submission.

Reasons: The Department adopts an e-Filing requirement for administrative litigation to align the Department's general procedures with existing Department processes for the submission of documents in administrative litigation involving enforcement and compliance under the student

financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA), as well as to enhance accessibility and operational efficiency.

By a final rule published in the *Federal Register* on August 7, 2013 (78 FR 48048), the Department adopted an electronic filing system for use in administrative litigation involving title IV, HEA programs. The rule offered parties an alternative to paper-based OHA submissions. Thus, broadening the scope of electronic filing aligns with a process the Department has already implemented.

Electronic filing also promotes the accessibility of administrative litigation submissions for individuals with disabilities. Section 504 of the Rehabilitation Act requires that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program . . . conducted by any Executive agency." Section 508 further establishes requirements for electronic and information technology developed, maintained, procured, or used by the Federal government and requires Federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public. The Department has committed to "making its

electronic and information technologies accessible to individuals with disabilities by meeting or exceeding the requirements of Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended in 1998." U.S. Department of Education, Accessibility Statement (available at <https://www2.ed.gov/notices/accessibility/index.html>).

Under a system requiring electronic filing, accessible formatting of documents is expedited by avoiding the need for Department staff to scan paper copies, which can sometimes number in the hundreds or even thousands of pages. Accessibility is accomplished through the use of assistive technology, like a Windows-Eyes or JAWS screen reader, further advancing OHA's and the Department's ability to achieve the objectives of the Rehabilitation Act.

Additionally, requiring e-filing will make administrative litigation submissions more accessible to all parties. When a party to a matter files a document through OES or the presiding ALJ issues an order or decision, the document appears in the electronic docket. That docket is accessible to any person who is a party or who represents a party. Once a person has access to the electronic docket of filings, that person can then open an electronic copy of the document. Requiring all parties to use OES ensures that all parties have access to the same information and all parties know conclusively what

arguments have been made and what evidence is before the tribunal in support of those arguments. Additionally, if a party changes representation, or retains representation at some time during the pendency of the matter, the new representative can be given access to all orders and filings in the case instantaneously. Additionally, in the Department's experience, parties that submit filings by facsimile or in paper format want assurance that such filings have been timely received by OHA or OS. Having all relevant documents accessible through one electronic docket, when possible, will eliminate the need to confirm receipt.

Also, there is an added efficiency to requiring that all filings be made in electronic format. Nearly any matter initially coming before OHA can be appealed, after a final agency decision is issued by the Secretary, to a Federal district court or Federal circuit court of appeals. All, or nearly all, Federal district and circuit courts use electronic files through the Public Access to Court Electronic Records (PACER) system or through case management/electronic case files (CM/ECF) systems. Having all documents filed in a case already in electronic format leads to efficiency in submitting the case file to the relevant Federal court. In fact, the United States Court of Appeals for the Fifth Circuit has sent a letter to OHA indicating that it requires all case files in matters

appealed to that Court to be sent in electronic format. Additionally, as noted on the OHA website at oha.ed.gov, electronic filing allows parties to file documents and pleadings electronically in less time and at substantially less cost than paper filings by allowing the parties to forgo printing, postage, and courier costs.

Waiver of Proposed Rulemaking and Delayed Effective Date

Under the APA (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice and comment rulemaking for interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. 5 U.S.C. 553(b)(3)(A). See, e.g., *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001); *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (procedural rules "'cover[] agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency.'" (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980))). This rule solely addresses the manner in which the parties submit certain filings to the Department and, accordingly, is a procedural rule for which notice and comment rulemaking is not required.

The APA generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). As previously stated, because the final regulations merely reflect minor changes to agency procedure, which are designed to make the process more accessible, transparent, and efficient for all parties, there is good cause to waive the delayed effective date in the APA and make the final regulations effective upon publication.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order (EO) 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of EO 12866 defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under EO 12866.

We have also reviewed these regulations under EO 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in EO 12866. To the extent permitted by law, EO 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net

benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

EO 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs.

The Department has analyzed the costs and benefits of complying with these final regulations. Due to annual variation in the number and size of administrative litigation filings, we cannot estimate, with absolute

precision, the likely effects of these regulations.

However, as discussed below, we estimate that these final regulations will result in a net cost savings of between \$4,571 and \$5,570 over the next 10 years.

For purposes of these estimates, the Department assumes that OHA and OS receive approximately 2.5 paper filings in administrative litigation per year. Of those, we assume that approximately 25 percent are submitted by law offices and the remaining 75 percent are submitted by educational institutions or entities. We assume that submissions made by law offices would be completed by paralegals at a rate of \$41.26 per hour and submissions made by educational institutions or entities would be completed by an administrative assistant at a rate of \$45.10 per hour. We assume that submissions made by Department staff would be conducted by staff at the GS-11 level at a rate of approximately \$51.55 per hour.

We assume that staff who typically prepare and transmit paper copies of filings will need to familiarize themselves with the requirements in the final regulations and OES. We assume that this activity will take approximately 1 hour for an estimated one-time cost of \$110.

Currently, staff preparing and transmitting paper filings are required to prepare such filings in triplicate. We assume this work takes paralegals and administrative

assistants approximately 15 minutes per filing. This estimate is intended to capture time to compile, bind, and pack the filings for transmittal. We do not estimate time burdens for printing, during which time we assume staff could be completing other tasks. We also assume that each filing requires approximately \$10 in materials such as paper, binders, and boxes. We assume that staff then ship the filings at a cost of approximately \$50 per filing, based on approximate costs for shipping a 15-pound parcel Priority Mail Express through the U.S. Postal Service. Once the paper filings are received by OHA, we assume it takes approximately 4 hours per filing for OHA staff to process the filing, including logging it in, unbinding and scanning the materials, creating necessary folders, reviewing the scans, and uploading them to OES. Finally, in accordance with the Department's record retention policy, paper filings are eventually transferred to the National Archives and Record Administration for storage, which we assume takes 15 minutes per filing. In total, we estimate that the current process of paper filings has an annual cost of approximately \$725. These costs would be eliminated under the final regulations.

Under the final regulations, parties would directly upload filings into OES, which we estimate would take approximately 15 minutes per filing. We also assume that Department staff would need to spend approximately 15

minutes per filing for various processing activities. In total, we assume that the process under the final regulations would cost approximately \$60 per year.

Over the course of the next 10 years, we estimate that these final regulations will result in a net cost savings of between \$4,571 and \$5,570.

Regulatory Flexibility Act Certification

Because notice-and-comment rulemaking is not necessary for this procedural rule, the Regulatory Flexibility Act (96 Pub. Law 354, 5 U.S.C. 601-612) does not apply.

Paperwork Reduction Act of 1995

The final regulations do not create any new information collection requirements.

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List of Subjects in 34 CFR Part 81

Administrative practice and procedure, Grant programs-education.

Dated: September 15, 2021.

Denise L. Carter,
*Acting Assistant Secretary for
Finance and Operations.*

For the reasons discussed in the preamble, the Secretary amends part 81 of title 34 of the Code of Federal Regulations as follows:

PART 81-GENERAL EDUCATION PROVISIONS ACT-ENFORCEMENT

1. The authority citation for part 81 continues to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a).

2. Section 81.2 is amended by adding, in alphabetical order, a definition for "OES" to read as follows:

§ 81.2 Definitions.

* * * * *

OES means the OHA Electronic System or any successor system designated by the Department.

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3. Section 81.11 is amended by revising paragraph (c) to read as follows:

§ 81.11 Motions.

* * * * *

(c) Parties must file motions with the ALJ, and serve them upon the other party, as provided under § 81.12.

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4. Section 81.12 is revised to read as follows:

§ 81.12 Filing requirements.

(a) *Method of filing.* (1) Any written submission to an ALJ or the OALJ under this part, including pleadings,

petitions, and motions, must be filed by submission to OES unless a party shows the ALJ good cause why its written submission cannot be filed electronically. A party filing electronically is responsible for ensuring that a complete and legible document was successfully submitted in a format for electronic filing permitted under OHA procedures.

(2) If the ALJ permits a party to file a written submission in paper format, the filing party must file the written submission with the ALJ or the OALJ by hand-delivery or regular mail.

(b) *Filing date.* (1) The filing date for a written submission to an ALJ or the OALJ is the date the document is—

(i) Submitted to OES; or

(ii) Hand-delivered or mailed, if the ALJ has permitted the written submission to be filed in paper format.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day.

(c) *Service to other parties.* (1) The filing of a written submission to OES constitutes service on other parties.

(2) If a party is permitted by the ALJ to file a written submission in paper format, the party must serve a copy of the written submission on the other party on the

filing date by hand-delivery or regular mail. Any such written submission to the ALJ or OALJ must be accompanied by a statement certifying that the material was served on the other party on the filing date.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

5. Section 81.20 is amended by revising paragraphs (b)(2), (3), (c) and (d) to read as follows:

§ 81.20 Interlocutory appeals to the Secretary from rulings of an ALJ.

* * * * *

(b) * * *

(2) A petition may not exceed 10 pages, double-spaced, and must be accompanied by a copy of the ruling and any findings and opinions relating to the ruling.

(3)(i) The petition must be filed electronically, and served upon the ALJ and other parties, by submission to OES on behalf of the Office of the Secretary unless a party shows the Secretary good cause why the petition cannot be filed electronically.

(ii) If the Secretary permits a party to file a petition in paper format, the filing party must file the petition with OHA on behalf of the Secretary by hand-delivery or regular mail. The filing party must provide a copy of the petition to the ALJ at the time the petition is filed, and a copy of the petition must be served upon the other parties by hand-delivery or regular mail.

(c) If a party files a petition under this section, the ALJ may state to the Secretary a view as to whether review is appropriate by submitting a brief statement addressing the party's petition within 10 days of the ALJ's receipt of the petition for interlocutory review. The ALJ must serve a copy of the statement on all parties by submission to OES and, if the Secretary has permitted paper filing, by hand-delivery or regular mail.

(d) (1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed 10 pages, double-spaced, in length.

(2) A copy of the response must be filed to OES unless the party shows the Secretary good cause why the response cannot be filed electronically. If the ALJ permits a party to file a petition in paper format, the filing party must file the petition with OHA on behalf of the Secretary by hand-delivery or regular mail.

(3) If the Secretary has permitted a party to file the response in paper format, the party must file a copy of the response with the ALJ, and serve a copy of the response on all parties, on the filing date by hand delivery or regular mail.

* * * * *

6. Section 81.41 is amended by revising paragraph (c) to read as follows:

§ 81.41 Initial decision.

* * * * *

(c) The OALJ transmits the initial decision to the Secretary and to the parties by submission to OES and, if filing in paper format was permitted by the ALJ, by certified mail, return receipt requested, or by another parcel service with delivery confirmation.

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7. Section 81.42 is revised to read as follows:

§ 81.42 Petition for review of initial decision.

(a)(1) If a party seeks to obtain the Secretary's review of the initial decision of an ALJ, the party must file a petition for review by submission to OES on behalf of the Office of the Secretary unless the party shows the ALJ good cause why the petition cannot be filed electronically.

(2) If the ALJ permits a party to file a petition for review in paper format, the filing party must file the petition with the ALJ by hand-delivery or regular mail.

(b) A party must file a petition for review not later than 30 days after the date it receives the initial decision. The party is deemed to have received the initial decision on the date the initial decision is uploaded to OES or, if filing in paper format was permitted by the ALJ, the party is deemed to have received the initial decision

on the delivery date indicated by the certified mail or parcel delivery records.

(c) Electronically filing a petition to OES for review constitutes service on the other party.

(d) If the ALJ has permitted the petition to be filed in paper format, then—

(1) The party must serve a copy of the petition on the other party on the filing date by hand delivery or by “overnight” or “express” mail. If agreed upon by the parties, service of a copy of the petition may be made upon the other party by a method approved by the ALJ.

(2) Any petition submitted under this section in paper format must be accompanied by a statement certifying the date that the petition was served on the other party.

(e) A petition for review of an initial decision must—

(1) Identify the initial decision for which review is sought; and

(2) Include a statement of the reasons asserted by the party for affirming, modifying, setting aside, or remanding the initial decision in whole or in part.

(f) (1) A party may respond to a petition for review of an initial decision by filing a statement of its views on the issues raised in the petition, as provided for in this section, not later than 15 days after the date it receives the petition.

(2) If the ALJ has permitted the written submission to be filed in paper format, a party must serve a copy of its statement of views on the other party by hand delivery or mail and certify that it has done so pursuant to the provisions of paragraph (d) of this section.

(g)(1) The filing date for petitions under this section is the date the document is—

(i) Electronically filed; or

(ii) Hand-delivered or mailed, if permitted to file in paper format.

(2) If a scheduled filing date falls on a Saturday, Sunday, or a Federal holiday, the filing deadline is the next business day.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(e), and 3474(a))

8. Section 81.44 is amended by revising paragraph (b) to read as follows:

§ 81.44 Final decision of the Department.

* * * * *

(b) If the Secretary modifies or sets aside the ALJ's initial decision, a copy of the Secretary's decision is provided to the parties by submission to OES. If the ALJ has permitted written submissions to be filed in paper format, the decision will be sent by certified mail, return receipt requested, or by another parcel service with delivery confirmation. The Secretary's decision becomes

the final decision of the Department on the date it is electronically filed or, if sent via parcel delivery service, on the delivery date indicated by the certified mail or parcel delivery records.

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(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(g), and 3474(a))

[FR Doc. 2021-20304 Filed: 9/22/2021 8:45 am; Publication Date: 9/23/2021]